JAMES P. BROWNING, JR.

No. 476

SUPREME COURT OF THE UNITED STATES

W. A. MONGRELL, JR. and JOE E. KEADZUBA,
Petitioners,

v.

PASCHAL PETROLEUM COMPANY,
A Delaware Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ESTHER BOWDOIN
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Petitioners

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Fort Worth Brief Printing Co., [illegible] Fort Worth, Texas

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No:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

W. A. MONCRIEF, JR. and JOE J. KLABZUBA,
Petitioners

v.

PASOTEX PETROLEUM COMPANY,
A Delaware Corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on May 17, 1960.

I

OPINIONS BELOW

The District Court for the Eastern District of Oklahoma did not write an opinion. The Findings of Fact, Conclusions of Law, and the Decree of that

Court is set forth in the record to the Court below (RCA 29-39).[1] The opinion of the Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix "A", *infra*, page 23.

II.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on May 17, 1960 (R. 10). Petition for Rehearing on Jurisdictional grounds was denied on August 11, 1960 (R. 39). Second Petition for Rehearing was denied on August 30, 1960 (R. 81). Motion to Stay the Mandate of the Court of Appeals was granted effective September 9, 1960, for a period of thirty days, provided that if this Petition was filed within the period of the Stay, such Stay would continue until final disposition by the Court. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

III.

QUESTIONS PRESENTED

This case involves the construction of a Departmental Oil and Gas Lease covering restricted Indian

[1] "RCA" is used to designate the record on appeal to the Court of Appeals and "R" is used to designate the record on Petition for Certiorari to this Court. The former was incorporated by reference into the record certified to this court (R. 1).

Nine printed copies of the Record to the Court of Appeals are enclosed with the Petition for Certiorari to this Court. To prevent the appendix hereto, *infra* pages 23-41 from becoming unduly long, we have not reproduced anything which appears in the record on appeal to the Court below.

lands. It was approved by the Secretary of Interior for a primary term of ten (10) years and was issued in accordance with rules and regulations of the Department of Interior. It is undisputed that Respondent (the lessee therein) did not have a completed well, capable of producing oil or gas in paying quantities, at the expiration of the primary term of the lease although it had commenced drilling operations on such well. The dispositive, substantive issue presented is whether such Departmental lease requires the completion of a well capable of producing oil or gas in paying quantities in order to extend the primary term, or alternatively, whether such primary term is automatically extended by the mere commencement of drilling operations. Using language commonly understood in the oil industry, the question is simply whether or not the Departmental lease is a "completion" or "commencement" type oil and gas lease.

The Court of Appeals retained jurisdiction of the case on the basis of the existence of a *Federal question*, but decided that question on the basis of *State law*. Thus, the following questions are presented:

> (1) Is the construction of a Departmental Oil and Gas Lease a question "arising under the Constitution, laws and treaties of the United States?"
>
> (2) If that question is answered in the affirmative, then is the Federal Court bound to construe the lease by applying only the law of the State where the Court is sitting (as held below) or may the Court apply Federal law?
>
> (3) If such a lease is to be construed under

Federal law, does it expire in the absence of production at the end of the primary term even though drilling operations have been commenced?

The final two questions presented concern administrative procedure and may be stated as follows:

(4) Has the Congress delegated to the Secretary of Interior jurisdictional power to determine whether a Departmental Oil and Gas Lease has expired by its own terms?

(5) If the preceding question is answered in the affirmative, then must the administrative remedy before the Secretary be exhausted before resort is had to a United States District Court?

Upon the determination of these questions depends the rights and obligations of the United States, restricted Indians who are Wards of the United States, and Lessees under hundreds of Departmental Oil and Gas Leases covering thousands of acres of land located in many states.

IV.

STATUTES INVOLVED

Every provision of the Departmental lease (RCA 9-19) is governed by Federal regulations. The leasing of restricted Indian lands of members of the Five Civilized Tribes is governed by regulations set forth in 25 C.F.R., Part 174. Pertinent sections of the regulations are quoted in Appendix "B" hereto, *infra*, pages 28-30. Statutory authority for such regulations is contained in Section 2, 35 Stat. 312, Section 18, 41

Stat. 426, Section 1, 45 Stat. 495, Section 1, 45 Stat. 777, Sections 16-17, 48 Stat. 987, 988, Section 9, 49 Stat. 1968, Section 4, 52 Stat. 348; 25 U.S.C. 68, 356, 396d, 476, 477, 599.

Other statutory provisions involved are 28 U.S.C., Section 1331(a) and Section 3 of the Act of April 12, 1926, 44 Stat. 239, as amended, by Section 3(c) of the Act of August 4, 1947, 61 Stat. 732, the same being set out in Appendix "B", *infra*, pages 30-33.

Reference is also made in this Petition to certain sections of 30 C.F.R., Part 221, entitled "*Operating regulations*" governing the development of lands for oil and gas under the supervision of the Department of Interior which are set out in Appendix "B" hereto, *infra*, pages 33-35.

V.

STATEMENT

The essential facts in this case are undisputed. Rosa McCann, a Full-Blood Indian allottee, executed a departmental type oil and gas lease in favor of The California Company on May 13, 1948 (RCA 9). This lease covered 96.55 acres of land in Love County, Oklahoma, including the 32.18 acres in controversy. The Secretary of the Interior approved this lease on the *10th day of June, 1948*[1] (RCA 18), and the term clause of such lease provided in part as follows:

> "Lessor, * * * does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all of

[1] Emphasis supplied throughout.

> the oil and natural gas deposits in or under the following described tracts of land * * * *for the term of ten years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities from said land.*" (Par. 1, RCA 10; 25 C.F.R. 174.5, *infra*, pages 28-29.)

One of Rosa McCann's children, Mary Bell Cooper, now Chadwick, a Half-Blood Indian, inherited an undivided one-third interest in said lands, or a total of 32.18 acres.

The Rosa McCann lease was subsequently assigned by The California Company to Respondent. In March of 1958, Respondent, pursuant to action before the Corporation Commission of Oklahoma, caused the 32.18 acres in dispute to be pooled with other lands to form two drilling and spacing units. With respect to one of these units, Respondent included therein another tract upon which it had previously commenced the drilling of a well (RCA 75). It was the drilling operations on this well (referred to herein as the Brannan well) that Respondent claims extended the primary term of the Departmental lease insofar as it covers the 32.18 acres (RCA 7).

In May of 1958, approximately one month before the primary term of the Departmental lease expired, Respondent (Pasotex) requested the Department of Interior to advertise the 32.18 acres for competitive lease bidding. The Department permitted the same to be advertised and served notice that bidding would take place in the County Court of Love County, Okla-

homa. In open Court and at public auction on the 27th day of May, 1958, one of the Petitioners, Joe J. Klabzuba, and the Respondent engaged in competitive bidding for a new oil and gas lease on the 32.18 acres. The Petitioner, Klabzuba, having made the highest bid ($6,600), obtained a lease on the disuted acreage for a term of five (5) years from *June 10, 1958*, such lease having been subsequently assigned in part to W. A. Moncrief, Jr., Fort Worth, Texas. The new lease was sold through the County Court of Love County, Oklahoma. (RCA 4)

Thereafter, *on June 10, 1958*, the Haliburton Oil Well Cementing Company conducted a drill stem test on the Brannan Well. During a one and one-half hour test period, there was brought to the surface and measured by an Orifice Meter placed in the gas vent line 23.1 M.C.F. of gas and 2.1 barrels of condensate. Both the gas and condensate brought to the surface as a result of this drill stem test were burned, and no attempt was made to market, save or otherwise reduce such hydrocarbons to possession (RCA 29; 61).

An electric log was run on the well on June 12, 1958, (RCA 28). Casing was run in the well on June 14, 1958. Tubing was run in the well on June 15, 1958, and the casing was first perforated into the Basal Oil Creek Sand on June 18, 1958. The last perforations of the casing into the Basal Oil Creek Sand were made on June 19, 1958 (RCA 27). A Christmas tree was installed on the well on June 21, 1958. At the time of the trial, no separation equipment or tankage had been installed on the lease (RCA 28).

The first oil or gas ever brought to the surface in the Brannan well through *its permanent producing equipment occurred on June 21, 1958*, for the purpose of conducting open flow potential tests. The gas produced through the permanent production equipment as a result of the open flow tests was flared, but the condensate produced in connection therewith was sold and marketed on July 6, 1958 (RCA 28).

Petitioners notified Respondent of their claim to the 32.18 acres and offered to pay their proportionate part (approximately 7%) of the total costs of drilling and completing the Brannan well. This offer was refused.

On August 18, 1958, Petitioners filed this suit in the United States District Court for the Eastern District of Oklahoma for the purpose of quieting title as against Respondent's Departmental lease insofar as it covered the 32.18 acres here in dispute (RCA 1). Respondent, after having made the Half-Blood Indian heir a party defendant to the suit and after having served notice of the pendency of the suit on the Department of Interior, filed its Answer and counterclaim against the Petitioners and the Indian alleging the validity of its own lease. (RCA 3-9) The original theory of Federal jurisdiction was that of diversity of citizenship (RCA 53-55). When it was determined that there was no diversity between Petitioner Moncrief and Respondent[1], Petitioners offered to dismiss (RCA 54). The Respondent resisted this dismissal on the ground that jurisdiction existed because of a Fed-

[1]Under the recent amendment to 28 U.S.C., Section 1332 the corporate defendant (Pasotex) was deemed to be a citizen of both Delaware and Texas and Moncrief is a citizen of Texas.

eral question. The Department of Interior refused to participate in the suit because, in its judgment, the interest of the Indian is "not in jeopardy" (RCA 71).

On July 30, 1959, the District Court rendered its findings and conclusions validating the Departmental lease and declared Petitioners' lease to be null and void. On May 17, 1960, the Court of Appeals affirmed the Judgment of the District Court, using as authority for its decision, the *substantive law of* Oklahoma, but retained jurisdiction of the case on the basis of the existence of a Federal question. Petitioners thereupon timely filed their First Petition for Rehearing which urged the lack of Federal jurisdiction to decide the case. (R. 11-21).

On June 28, 1960, the Court of Appeals directed the Respondent to file a response to this Petition for Rehearing (R. 22-30) and thereafter on August 11, 1960, the Court denied the Petition without opinion (R. 39), but permitted the Petitioners to file a Second Petition for Rehearing. Such Second Petition for Rehearing was thereupon filed urging that federal law should be applied in construing the Departmental lease (R. 40-80). It was denied by the Court on August 20, 1960, also without opinion (R. 81).

VI.

REASONS FOR GRANTING THE WRIT

1. This Court has repeatedly held that the existence of a Federal question which will vest jurisdiction in a United States District Court must be disclosed

by the complaint unaided by the defendant's answer or affirmative defenses. *Metcalf v. Watertown*, 128 U.S. 586, 589; 32 L.Ed. 543, 544; *Gully v. First National Bank*, 299 U.S. 109, 114, 81 L.Ed. 70, 72; *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667, 672, 673; 94 L.Ed. 1194, 1200.

The complaint filed by the Petitioners in this case did not raise a Federal question (RCA 1). The District Court so concluded (RCA 34). Jurisdiction was retained in the Federal Court only as a result of a *counterclaim* (RCA 5; 54) filed by the Respondent which did nothing more than to assert the superiority of its own leasehold title. Allegations therein which merely show that the claim asserted has its *origin* in the laws of the United States are insufficient to raise a Federal question. Such allegations must clearly reflect a genuine controversy involving the validity, construction or effect of Federal law. *Shulthis v. McDougal*, 225 U.S. 561, 56 L.Ed. 1025; *Earnett v. Kuykel*, 264 U.S. 16, 68 L.Ed. 539. *Since there is no jurisdictional basis asserted in the counterclaim independent of that contained in the complaint*, the counterclaim could not survive. *Kelleam, et al v. Maryland Casualty*, 312 U.S. 377, 382; 85 L.Ed. 899, 903. Moreover, this Court in recent opinions has shown an increasing reluctance to expand Federal question jurisdiction through a broad reading of 28 U.S.C. 1331. *Romero v. International Terminal Operating Company*, 358 U.S. 354; 3 L.Ed. 2d 368; *Skelly Oil Company v. Phillips Petroleum Company*, *supra*.

In the absence of a Federal statute creating juris-

diction in the Federal court, the mere presence of an Indian as a party to the suit does not vest Federal jurisdiction. *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915, cert. denied, 356 U.S. 960, 2 L.Ed. 2d 1067. See also, *Martinez v. Southern Ute Tribe*, 273 F.2d 731. The Respondent however, in an effort to bolster its jurisdictional argument, contended that Section 3 of an Act of Congress dated April 12, 1926, 44 Stat. 239 *infra*, pages 30-32) conferred *original* jurisdiction in the Federal Court. This statute, according to its plain and unambiguous language, relates only to the *removal* of certain cases. Sometimes, where a member of the Five Civilized Tribes is a party to a lawsuit, the statute permits the United States to remove a case from a State Court to a Federal District Court. *Davis v. Jones*, 254 F.2d 696, 698, cert. denied, 358 U.S. 865, 2 L.Ed. 2d 98. It has nothing to do with original jurisdiction and defeats State jurisdiction only when the United States, *acting in the interest of the Indian*, elects to remove the case. *U.S. v. Kennamer*, 37 F.2d 243, 246. Furthermore, the 1947 amendment to the Act, *infra*, page 33, makes it absolutely certain that the right of removal is exclusive to the Government:

> "No action . . . shall be removed to a United States district court except upon the recommendation of the Secretary of the Interior or his duly authorized representative."

2. The lower Courts' determination that Federal jurisdiction exists in this case is predicated solely on the existence of a Federal question arising "under the

Constitution, laws and treaties of the United States." Yet, with obvious inconsistency, the opinion of the Court of Appeals makes it quite clear that it has decided the dispositive issue in this case purely by the substantive law of Oklahoma. *infra*, page 26. On this point the Court of Appeals declared:

> "To explore the soundness of the premise, [that the departmental lease required the completion of a commercial well during the primary term] the drilling and production requirements of the lease must be examined *in the light of Oklahoma* law as it has been pronounced."

Where diversity of citizenship is lacking, it is fundamental that a Federal Court is *not* required to follow the substantive law of the State where it is sitting in resolving questions arising under the Constitution, laws and treaties of the United States. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188. Without exception, this Court has concluded that such cases should be resolved in accordance with Federal law. *Jackson County v. United States*, 308 U.S. 343, 349, 350; 84 L.Ed. 313, 316; *Deitrick v. Greaney*, 309 U.S. 190, 200, 201; 84 L.Ed. 694, 701; *D'Oench D. & Co. v. Fed. Deposit Insurance Corp.*, 315 U.S. 447, 455, 456; 86 L.Ed. 956, 961.

The Departmental lease is nothing more than a restatement of the rules and regulations issued by the Department of Interior pursuant to Acts of Congress covering the leasing of restricted Indian lands. *infra*, pages 28-30. Each of such regulations has the same force and effect as a Federal statute. *Seber v. Spring*

Oil Company, 33 F.Supp. 805; 808 (N.D. Okla. 1940); *Cuba v. United States*, 152 U.S. 211, 38 L.Ed. 415. To sustain Federal jurisdiction, the Court of Appeals concluded that the question to be determined involved the construction of Federal law. If the case can be determined *without deciding a Federal question*, Petitioners say that there simply is no Federal jurisdiction. If the case *can be determined only by construing Federal law*, we then say *it should be decided in accordance with Federal law*.

For that matter, the regulations make it perfectly clear that the Secretary of Interior, when construing a Departmental lease, is *not* confined to the application of State law:

> "In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws, State laws, regulations by competent Federal or State authority, lawful agreements among operators regulating either drilling or production or both." 25 C.F.R. 174.31, *infra*, page 29.

3. The decision of the Court below, using as it does the substantive law of Oklahoma in construing the Departmental lease, is in probable conflict with the decision of this Court in *Sperry Oil and Gas Co. v. Chisholm*, 264 U.S. 488, 68 L.Ed. 803. In the *Sperry* case, this Court unequivocally declared that the laws of Oklahoma must give way to Federal law in the construction of oil and gas leases covering restricted Indian lands:

> "Neither the constitution of a State nor any act of its legislature, whatever rights it may confer

> on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority." 264 U.S. 497; 68 L.Ed. 810.

4. The impact of the lower Court's opinion will extend far beyond Petitioners' particular interest because there are now hundreds of existing oil and gas leases, not only in Oklahoma, but in other states as well, covering thousands of acres of land held under the same, or substantially the same, Departmental form here involved. Not only are restricted Indian lands covered by this form of lease, but United States public lands as well, including the "acquired lands" which are now subject to lease by the Department of Interior. (43 C.F.R., Part 192, 1959 Poc. Supp.) It is important in the administration of Departmental Oil and Gas Leases and plainly in the public interest, to have some degree of uniformity in the construction of such leases. As a result of the lower Court's decision, there can be no uniformity of construction between United States District Courts, even those under the jurisdiction of the 10th Circuit, because a District Court will be constrained to construe the lease in accordance with the substantive law of the particular State where the Court is sitting. To illustrate, since the Departmental lease was construed in accordance with what the Court of Appeals considered to be the Oklahoma law, the Court would necessarily apply Kansas law if this identical lease were brought on an appeal from a United States District Court sitting in Kansas. If so, the construction of the Departmental

lease would be just the opposite. *Home Royalty, Inc. v. Stone*, et al, 199 F.2d 650 (10th Cir. 1952). Likewise, a different conclusion would have resulted if the case had been appealed from a United States District Court sitting in New Mexico[1], Montana[2], Ohio[3] or Texas[4].

5. The opinion of the Court of Appeals is directly in conflict with the findings and decisions of the Department of Interior in construing Departmental Oil and Gas Leases covering restricted Indian lands. The Department has uniformly construed such leases to be "completion leases" that required production in paying quantities prior to the expiration of the primary term of the lease. See Opinion of the Assistant Secretary, *Oil and Gas Leases on Allotted Indian Lands*, dated July 2, 1942, 58 I.D. 12. See also, the Opinion of the Assistant Secretary in the case of The Superior Oil Company and The British-American Oil Producing Company, IA-697, March 8, 1957, 64 I.D.49 and printed in Appendix "C" hereto, *infra*, pages 36-41.

The Secretary has consistently reached the same conclusion in construing Federal Oil and Gas Leases covering public lands. *James Shelton*, 62 I.D. 236; *H. K. Riddle*, 62 I.D. 82; Martin Oil Company, 63 I.D. 392; United Manufacturing Company, 65 I. D. 106; See also Solicitors Opinion, *Oil and Gas Leases*, 60 I.D. 261.

The Court of Appeals correctly points out in its opinion that the Departmental lease does not contain

[1] *Tonic Land Grant v. Ringle Development Co.*, 240 P. 2d 850 (1952).
[2] *Berthelote v. Loy Oil Co.*, 28 P. 2d 187 (1934).
[3] *Murdock West Co. v. Logan*, 69 N.E. 984 (1904).
[4] *Holchak v. Clark*, 284 S.W. 2d 209 (1955).

a delay rental, well completion or continuous drilling clause, "so as to clearly indicate the intention of the parties to contract conditionally beyond the primary term", *infra*, page 26. After having made this determination, we submit that the Court should then *have scrutinized the term clause* in order to ascertain what was required to extend the lease beyond the primary term of ten years. In other words, since the Court apparently found that there was no provision in the lease which modified the term clause, such clause standing alone and unaided fixed the duration of the Departmental lease. According to its express provisions, only production "in paying quantities" could operate to extend the term clause (to which we might add, parenthetically, could result only from a completed well, physically capable of producing oil or gas). We respectfully submit the overwhelming weight of authority in this country, both State and Federal cases, sustains us in this premise. *Summers, Oil & Gas*, Vol. 2, Sections 293 and 300 (Perm. Ed. 1959). In a footnote to its opinion, the Court of Appeals concedes *that Oklahoma law is in conflict with the law of other jurisdictions on this point; infra*, page 27. With the exception noted below, however, the most recent pronouncement by the Oklahoma Supreme Court actually is *in accord* with the majority view. *State v. Carter Oil Company of West Virginia*, 336 Pac.2d 1086.

The only deviation that the Oklahoma Courts have made from this general rule is that when the lease contains a delay rental clause, such clause has been construed with the term clause to permit the comple-

tion of a well commenced during the primary term. *Simms v. McDaniel*, 7 Pac.2d 419. The Oklahoma Courts have reasoned that since the lessee paid for the right to delay the commencement of a well, the lessee should have what was "reasonably necessary to the enjoyment of the thing granted" *by the lease*, namely, the right to complete the well. The Departmental lease contains *no delay rental clause. Neither does it contain a commencement or continuous drilling clause* which would permit the Respondent to complete the well after the primary term had expired. Nevertheless, the Court of Appeals paid no attention to this distinction so carefully made in Oklahoma cases such as *State v. Carter Oil Company*, *supra*, and seized upon an offset well clause in the Departmental lease and construed it to have *the same legal effect* as a delay rental or continuous drilling clause. The offset well clause (25 C.F.R. 174.32, *infra*, pages 29-30) is designed to protect the leased land from drainage and of course, does not become operative except to protect against drainage. The construction placed upon the offset well clause by the Court of Appeals did nothing more than work an equitable extension of the lease, contrary and in disregard of the plain language of the lease agreement.

6. The Federal Rules of Practice governing oil and gas leases on public lands are set forth in 43 C.F.R., Part 221, (1959, Poc.Supp.). Initial jurisdiction to determine all contests or protests involving such leases is vested in the Secretary of Interior. 43 C.F.R., Sections 221.51 and 221.53. It has been held that the pro-

cedures for relief provided for in these rules must be exhausted before resort may be had to the Court:

> "It is not possible for the Court at this time to determine that either plaintiff or defendants do not have any interest in the property in question. This matter should be ascertained by the Bureau of Land Management under the administrative procedures as set forth in the Act. Until administrative remedies have been exhausted, neither plaintiff nor defendant have any right to ask this court to solve the problem. As a consequence, this action will be ordered dismissed." *Call v. Richfield Oil Corp.*, 101 F.Supp. 972, 975 (S.D. Cal. 1951).

The language of the regulations governing the leasing of restricted lands of members of the Five Civilized Tribes strongly indicates that Congress likewise intends for the Secretary to *initially* pass upon questions arising out of oil and gas leases issued pursuant to such regulations. For example, the Secretary is empowered to impose penalties and cancellations where lease violations occur:

> "*Penalties. Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, orders of the Area Director or his representative, or the orders of the supervisor or his representative,* shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each day the terms of the lease, the regulations, or such orders are violated, or to both such penalty and cancellation: *Provided*, That the lessee shall be entitled to notice and hearing, within 30 days after such

notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, *whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 20 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.*" 25 C.F.R. 174.37.

"*Cancellations.* (a) *When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations,* or if mining operations are conducted wastefully and without regard to good mining practice, *the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void,* and the lessor shall then be entitled and authorized to take immediate possession of the land." 25 C.F.R. 174.40.

"*Oil and Gas Operating Regulations*" governing the development of lands under Departmental supervision, *including restricted Indian lands*, are contained in 30 C.F.R., Part 221. Pertinent sections of these regulations are set out in Appendix "B" hereto, *infra*, pages 33-35. Section 221.3, (*infra*, pages 33-34), entitled "Jurisdiction" provides in part that:

". . . all [drilling and production] operations subject to the regulations in this part *are under the jurisdiction of the supervisor for any district as delineated* by the Director."

Section 221.4, *Infra*, page 310 entitled "General functions" states in part as follows:

> "§ 221.4 *General functions.* The supervisor is hereby authorized to *require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law* to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste."

The Secretary of Interior has never relinquished supervision of the Departmental lease insofar as it relates to the controverted 32.18 acres (RCA 78). Yet, he has thus far declined to make an official ruling as to whether or not such lease expired at the expiration of its primary term, merely being content to say that the rights of the Indian are not in "jeopardy" (RCA 71). The Court below has held a formal finding by the Secretary of Interior in construing a Departmental lease is binding upon the Courts in the absence of a showing that the finding was arbitrary or fraudulent. *Continental Oil Company v. Osage Refining Company*, 69 F.2d 19, 27 (10th Cir. 1934).

We submit that the Department of Interior should not be permitted to adopt a "laissez-faire" attitude with regard to matters which Congress has entrusted to its supervision. The Department should not be permitted to "switch off" its jurisdiction because it thinks an Indian Ward's rights are not "in jeopardy" and then suddenly "switch it on" again when it thinks the

economic interest of the United States is at stake. For example, if this case involved valuable lands under Departmental supervision in Alaska or in the Tidelands area (as may well happen in the future), the Secretary would be before this Court taking a more jealous attitude of his delegated authority.

Finally, we respectfully ask the Court to bear in mind that Petitioners' lease by which they assert a claim of interest to the lands involved was obtained at a judicial sale as a result of action by the Department of Interior in permitting such lease to be advertised for competitive bidding. It should be emphasized that the County Court of Love County, Oklahoma, who sold the lease to Petitioner Klabzuba, *was acting as a "federal agency" for the Department. Parker v. Richard*, 250 U.S. 235, 63 L.Ed. 954; *United States v. Gypsy Oil Company*, 10 F.2d 487, 492 (10th Cir. 1925). Such authority was conferred upon it directly by the Congress. Section 9, 61 Stat. 731. Moreover, the Department had *absolute discretion* as to whether this new lease should have been advertised for bidding. 25 C.F.R. 174.4, Appendix "B" hereto, *infra*, page 28. Petitioners proceeded to bid on the lease in good faith as a result of the actions of the Respondent and the Department, only to be told later that the proceedings in the County Court of Oklahoma were merely held for the purpose of providing insurance, albeit unnecessary, for the Respondent.

The Secretary undoubtedly has broad discretionary power in the administration of lands under his supervision, especially in the granting of oil and gas leases.

In this case, however, the Secretary first *exercised* his discretionary authority and approved an oil and gas lease to the Respondent covering lands under his supervision. Ten years later, he *again exercised* his discretion and permitted the Petitioners to purchase a new lease which included the *same* acreage previously covered by Respondent's lease. Under such circumstances, the regulations conferred upon the Secretary not only the jurisdiction, but the duty, to dispose of this controversy, and this case should be dismissed and remanded to him for that purpose.

VII.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Luther Bohanon
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Oklahoma City, Oklahoma
Counsel of Record for Petitioner.

Dee J. Kelly
Petroleum Building
9th & Commerce
Fort Worth, Texas

APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term, 1960

No. 6239

W. A. MONCRIEF, JR. AND
JOE J. KLABZUBA, Appellants

v.

PASOTEX PETROLEUM COMPANY,
A Delaware corporation, Appellee

Appeal from the United States District Court
for the Eastern District of Oklahoma

Dee J. Kelly, Fort Worth, Texas, and T. Murray Robinson, of Robinson, Shipp, Robertson & Barnes, Oklahoma City, Oklahoma, for Appellants.

George N. Otey, Admore, Oklahoma, (R. Rhys Evans, Ardmore, Oklahoma, and C. W. Proctor, Houston, Texas, T. N. Jordan, Jr., Coloraclo, and Otey, Johnson & Evans, Ardmore, Oklahoma, of counsel, on the brief) for Appellee.

Before BRATTON, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

The dispositive question presented by this appeal is whether or not, under undisputed facts, the lessee of an oil and gas lease on restricted Oklahoma Indian lands has complied with the lease requirements so as to extend the lease beyond its primary term. Appellee-defendant is the lessee under the subject lease, one approved by the Department of Interior for Rosa Drake McCann, an enrolled full-blooded Choctaw Indian. Appellants-plaintiffs assert claim to the lands through a subsequent lease executed by the daughter and heir of the original allottee.[1]

The departmental lease, dated May 13, 1948, and approved by the Secretary of the Interior on June 10, 1948, is "for a term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities from said land." By other provisions in the lease, the lessee is required to pay periodically a cash rental; is required to drill and produce all wells necessary to offset or protect the leased land from drainage, or in lieu thereof to compensate the lessor in full for the estimated loss of royalty through drainage; is required at its election to drill and produce other wells, or in the event of its election not to drill and produce such other wells, to pay in lieu thereof a sum to be fixed by the Secretary of the Interior not to exceed $1.00 per acre per annum; is required to pay a royalty of 12½ per cent of the oil or gas, or both, produced and saved from

[1] The daughter, Mrs. Chadwick, is a party to this action though not named in the caption. The named parties are each considered as original lessees through some take by assignment.

the premises; is required to abide by and conform to any and all regulations of the Secretary of the Interior relative to such lease; and is required to comply with restrictions imposed by the Secretary as to the time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper.

By order dated March 6, 1958, the Oklahoma Corporation Commission designated the leased lands as part of a drilling unit consisting of a total of 320 acres and this order received the requisite approval of the Secretary of the Interior upon March 31, 1958. The drilling unit included a tract upon which appellee had begun drilling in 1957 and upon which production in paying quantities was discovered on June 4, 1958. Development was continued with due diligence and the well was completed as a commercial producer at a date not later than June 21, 1958.

On June 4, 1958, penetration was made into a gas producing horizon which was confirmed on June 7, 1958, to be the first of such kind capable of producing oil and gas in paying quantities. On June 10, 1958, this test was taken and production was measured for 24 hours, showing a rate of approximately 1,300,000 cubic feet of gas per day and 30 barrels of condensate. The rate of actual production of such flow test was sufficient to pay the cost of operating the well plus a profit based upon Corporation Commission allowables.

There was no drilling on this well subsequent to June 10, 1958, condensate from the well was sold between June 21, 1958, and June 25, 1958. The well produces condensate and gas which under Oklahoma law may not be wasted. Pasotex has supplied the well pending development of a market for the gas and is now drilling additional wells to establish reserves sufficient to obtain a permanent market for the sale of the gas from the well.

The consideration of the case requires neither a determination of the production date nor the issue of whether or not June 10, 1958, was within the primary term.

Each of appellants' contentions urging reversal spring as corollaries from their basic premise that the departmental lease required the completion of a commercial well during the primary term and that commencement of such a development during the primary term did not serve to extend the lessees' rights. To explore the soundness of the premise, the drilling and production requirements of the lease must be examined in view of Oklahoma law as it has been pronounced. And Oklahoma has consistently favored such interpretation of lease rights as will favor development and permit completion of a well rightfully commenced. *Simons v. McDaniel*, 154 Okl. 168, 7 P.2d 419, 421.

The departmental lease contains no specific provision requiring completion of a commercial well during the primary term and voiding the lease absent such completion: *Cf. State v. Carter Oil Co. of West Va.*, (Okl. 1959) 336 P. 2d 1086. Nor does it have a delay rental, well completion, or continuous drilling clause so as to clearly indicate the intention of the parties to contract conditionally beyond the primary term. *Cf. Champlin Refining Co. v. Magnolia Pet. Co.*, 178 Okl. 203, 62 P. 2d 249; *Hicks v. Mid-Kansas Oil & Gas Co.*, 182 Okl. 61, 76 P. 2d 269; *Provaznt v. Sealy*, 77 Okl. 244, 187 P. 235; *McClain v. Harper* (Okl. 1952) 244 P. 2d 301. But the lease did provide the right and duty to and upon the lessee to protect the lands by drilling at any and all times during the full extent of the primary term or pay royalties in lieu thereof, a clause indicative of the primary intent of the parties to develop the properties. The right to

commence a well during the primary term carries with it, by necessary legal implication, the right to complete the well after expiration of the primary term unless negatived by contract terms or loss by abandonment. *Simons v. McDaniel*, supra. The liberal rule of the Oklahoma courts has been recently applied in defining the distinction between "commencement" and "completion" leases and in extending the rights of lessees beyond the primary term in order to give by implication every right "which is necessary to the enjoyment of the thing granted." In *State v. Carter Oil Company of West Virginia*, supra, the court contrasted two leases one of which was "for a term ending September 26, 1955, and as long thereafter as oil, gas, casinghead gasoline or any of them is produced"; the other lease provided for a "term of five years from the date hereof and as long thereafter as oil and gas or either of them is produced in paying quantities . . . provided . . . that unless a producing well in paying quantities of oil or gas is completed on the above described premises within five years from date hereon this lease shall be void." The court termed the first lease a commencement lease allowing the lessee to complete the drilling after the expiration of the primary term. The second lease was held to be a completion lease but carrying with it only the obligation of completing a well capable of producing oil and gas in paying quantities during the primary term.

The court was fully cognizant of conflicting authorities. At page 1006 the court states:

"The commissioners cite numerous cases from other jurisdictions which although enlightening expound a rule in conflict with the decisions of this court. We are in accord with the philosophy of our previous holdings which is re-announced herein."

In view of these decisions of the state court we have no doubt that the trial court correctly concluded that the departmental lease was a commencement lease and that appellee had complied with its terms allowing an extension beyond the primary term.

The judgment is affirmed.

APPENDIX "B"

LEASING OF RESTRICTED LANDS OF MEMBERS OF FIVE CIVILIZED TRIBES, OKLAHOMA, FOR MINING (25 C.F.R., Part 174)

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§ 174.4. *Sale of oil and gas leases.* (c) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secretary may readvertise such lease for sale, or if deemed advisable, with the consent of the Indian owners, a lease may be made by private negotiations. The unsuccessful bidder or bidders will be required to pay his or their share of the advertising costs. Amounts received from unsuccessful bidders will be returned; but when no bid is accepted on a tract, the costs of advertising will be assessed against the applicant who requested that said tract be advertised.".

"§ 174.5. *Term of oil and gas leases.* Oil and

gas mining leases which require the approval of the Secretary of the Interior may be made for periods of 10 years from the date of approval of lease by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities."

"§ 174.31. *Restrictions on operations.* (a) Oil and gas leases issued under the provisions of this part shall be subject to imposition by the Secretary of the Interior of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor. In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws, State laws, regulations by competent Federal or State authorities, lawful agreements among operators regulating either drilling or production, or both.

"§ 174.32. *Wells.* The lessee shall agree (a) to drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof, compensate the lessor in full each month for the estimated loss of royalty through drainage: Provided, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the supervisor and payment in lieu of drilling and producing shall be with the consent of, and in an amount determined by the Secretary of the Interior; (b) at the election of the lessee to drill and produce other wells: Provided, That the right to drill and produce such other wells

shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (c) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion to insure reasonable diligence in the development and operation of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of the lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty herein specified."

28 U.S.C. Section 1331(a)

"§ 1331. *Federal question; amount in controversy; costs* (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." As amended July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

Act of April 12, 1926

Sec. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and

claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had

and in no event shall the United States be bound unless written notice is had as herein specified: *Provided*, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

Approved, April 12, 1926

44 Stat. 239

Act of August 4, 1947

Sec. 3 (c). No action or proceeding in which notice has been served on the Superintendent for the Five Civilized Tribes pursuant to the provisions of section 3 of the Act of April 12, 1926 (44 Stat. 239), shall be removed to a United States district court except upon the recommendation of the Secretary of the Interior or his duly authorized representative. The United States shall have the right to appeal from any order of remand entered in any case removed to a United States district court pursuant to the provisions of the Act of April 12, 1926 (44 Stat. 239).

Approved, August 4, 1947
61 Stat. 732

Oil and Gas Operating Regulations
30 C.F.R., Part 221

JURISDICTION AND FUNCTIONS OF SUPERVISOR

"§ 221.3. *Jurisdiction.* Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accuring to the lessor and paid in amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults of non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are

under the jurisdiction of the Supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to lands within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain these accounts. Upon request, the Supervisor or the Director will advise any person concerning the regulations in this part, and will furnish technical information and advice relative to oil and gas development and operation on lands subject hereto."

"§ 221.4. *General functions.* The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner so as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law. The supervisor may require satisfactory evidence that a lease is in good standing, that the lessee or operator is authorized to conduct operations, and that an acceptable bond has been filed before permitting operations on the leased land."

"§ 221.5. *Supervision of operations.* The supervisor shall inspect and supervise operations under the regulations in this part; prevent waste,

damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, and injury to life or property; and shall issue instructions necessary, in his judgment, to accomplish these purposes."

"§ 221.14. *Suspension of operations and production.* On receipt of an application for suspension of operations or production or for relief from any drilling or producing requirement under a lease, the supervisor shall forward such application, with a report and recommendation, to the appropriate official and, pending action thereon, grant such temporary approval as he may deem warranted in the premises, or reject such application, subject to the right of appeal as provided in § 221.66."

"§ 221.66. *Appeals.* An appeal from any order issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. Compliance with any such order shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, or the Secretary (dependent upon the officer with whom the appeal is pending), and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage."

APPENDIX "C"

THE SUPERIOR OIL COMPANY AND THE BRITISH-AMERICAN OIL PRODUCING COMPANY

IA-697

Decided March 8, 1957

Indian Lands: Leases and Permits: Oil and Gas

Where an Indian tribal oil and gas lease provides for a term of ten years and as much longer thereafter as oil and or gas is produced in paying quantities, upon failure of production after the primary period the lease terminates by its own terms.

Indian Lands: Leases and Permits: Oil and Gas—Oil and Gas Leases: Rentals

Neither the payment of advance rentals nor their receipt by Departmental officials upon a lease which had terminated can continue or reinstate the lease.

Indian Lands: Leases and Permits: Oil and Gas—Oil and Gas Leases: Suspension of Operations and Production

Under an Indian tribal oil and gas lease which provided as a condition to its existence that oil and gas be produced in paying quantities, upon a cessation of production no authority is vested in the Secretary of the Interior to allow a suspension of operations and thereby continue the term of the lease.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

IA-697 March 8, 1957

The Superior Oil Company and
The British-American Oil Producing Company

Oil and gas mining lease—1257-52

Appeal from a decision by the Commissioner of Indian Affairs that Wind River tribal lease I-96-Ind.6800 terminated for failure to produce in paying quantities.

Affirmed

APPEAL FROM THE COMMISSIONER OF INDIAN AFFAIRS

The Superior Oil Company and the British-American Oil Producing Company have, through their attorney, appealed from a decision by the Commissioner of Indian Affairs, dated December 19, 1955, which in effect affirmed a decision dated March 8, 1955, by the Area Director, Billings Area Office, Bureau of Indian Affairs, whereby the appellants were notified that an Indian tribal oil and gas mining lease held by them (I-96-Ind. 6806) had terminated because of a failure to produce oil and or gas in paying quantities.

The lease in question, made and entered into on

October 11, 1941, was approved by the Assistant Secretary of the Interior on January 3, 1942. The lease originally covered 280 acres[1] of Shoshone and Arapahoe tribal lands in Wyoming. The lease specified a term of "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and or gas is produced in paying quantities from said land", and for the payment, as royalty, of a percentage of the value or amount of oil and gas produced from the leased land. The primary term of the lease expired January 2, 1952. The record shows that a gas well was completed on the land held subject to the lease during the latter part of December, 1951. Copies of reports from the Regional Oil and Gas Supervisor, Geological Survey, are to the effect that the well in question produced gas through February, 1953[2] after which the well was "choked off by water" and no effort apparently was made thereafter to develop the land for mining purposes. Since the last period of production was during the year 1953, the advance acreage rentals paid by the appellants for the years 1954 and 1955 were ordered refunded to the appellants.

[1] After August 7, 1946 the lease was cancelled except as to 160 acres described as the NE¼, sec. 33, T. 3 N., R. 1 W.

[2] The following gas production by months was reported:

December	1951	801,000 c.f.	August	1952	817,000 c.f.
January	1952	2,117,000 "	September	1952	1,109,000 "
February	1952	2,148,000 "	October	1952	1,264,000 "
March	1952	1,618,000 "	November	1952	902,000 "
April	1952	1,123,000 "	December	1952	1,079,000 "
May	1952	1,136,000 "	January	1953	1,463,000 "
June	1952	888,000 "	February	1953	1,287,000 "
July	1952	1,007,000 "	March	1953	0 "

The appellants state that realizing the close proximity of the expiration date of the primary term, and appreciating the possibility of not being able to market the gas from the well in question and not knowing how permanent the production would be, an application was filed by them on December 26, 1951, for suspension of production and the continuance of the lease. While this application was submitted on the basis of the Departmental oil and gas operating regulations (30 CFR, Sec. 221.14), the Acting Director of the Geological Survey referred the matter to the Commissioner of Indian Affairs with the opinion that section 221.14 of the operating regulations did not constitute authority to waive the condition to the continuance of the lease beyond the primary term that oil or gas must be produced in paying quantities. The Commissioner of Indian Affairs concurred in this view in his decision of December 19, 1955.

The primary or fixed period of the above lease had expired. *Moreover, the only condition upon which that instrument might have been continued after the primary period was by the production of oil or gas in paying quantities, and unless such a condition of the lease is met the lease terminates, not by forfeiture, but by expiration of the period fixed by the contract of the*

§221.14 *Suspension of operations and production.* On receipt of an application for suspension of operations or production or for relief from the drilling or producing requirements under a lease, the supervisor shall forward such application with a report and recommendation to the appropriate official and, pending action thereon, grant such temporary approval as he may deem warranted in the premises or upon such application * * *

parties.[1] Thus, since the lease in question terminated when gas was no longer being produced in the year 1953, the advance acreage rentals which thereafter appear to have been paid for the years commencing January 3, 1954 and January 3, 1955 should be refunded. While a reference is made by the appellants to the payment of those rentals and their receipt by field officials of this Department, no effect can be imputed to such action as continuing the lease. In fact, the lease itself provides that such rentals are payable only during its continuance. Moreover, upon the termination of the lease, no further payments are due, neither could the making of such payments reinstate or continue a lease which had expired by virtue of its own terms.

There is no existing authority as a basis upon which the appellants' application for a suspension of operations could have been granted and the term of the lease extended. The appellants refer to the Assistant Secretary of the Interior's decision of March 23, 1955 (Robert E. Mead and Griffith Moore)[2] as reflecting the Secretary's power to grant relief in that respect. However, the action taken there was regarding an oil and gas lease issued under the provision of section 17 of the Mineral Leasing Act, as amended,[3] which

[1] *See Wilbur v. United States, ex rel. Ozark Oil & Refining Co.*, 54 F. 2d 437 (D.C. Cir. 1931); *Jewett v. Coffeyville Vitrified Brick & Tile Co.*, 122 Kan. 287, 251 P. 1110 (1927); 38 L.D. 12 (1942); Summers Oil & Gas, perm. ed., sec. 507.

[2] *See United States v. Brown*, 13 F. 2d 365 (N.D. Okla. 1926); *Haley v. Standard Oil & Gas Co.*, 228 F. 2d 298, 306 (C.A. 5th 1955).

[2] 62 I.D. 111.

[3] 30 U.S.C. (1952 ed.) sec. 226.

Act, of course, applies to public but not to Indian lands, such as those covered by the present lease. Moreover, a provision in the Mineral Leasing Act (sec. 39),[1] provides specifically for the suspension of operations and the extension of the term of leases issued under that Act. *The condition in the instant lease that it shall continue only for the primary period of ten years and as much longer thereafter as oil or gas is produced in paying quantities stems from a statutory limitation in that respect found in the Act of May 11, 1938.[2] In the face of such a Congressional direction, and in the absence of authority to waive or alter the condition under which the tribal lease was executed and approved, no officer of this Department was authorized to permit a suspension of operations under the tribal lease and thereby continue in force a lease which expired by reason of its own terms. Such administrative power must derive from Congressional authority which is not now apparent.* . . .

Accordingly, the decision of the Commissioner of Indian Affairs, dated December 29, 1955, is affirmed, and the appeal of the appellant oil companies is denied.

Hatfield Chilson
Assistant Secretary of the Interior